affects jurisdiction and an error of law which does not affect jurisdiction. This distinction is in fact drawn in the judgment of the Privy Council in the *South East Asia Fire Bricks Sdn. Bhd.* case[1] where Lord Fraser said: —

"But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective."

The same distinction made in the dissenting opinion of Geoffrey Lane L.J. in *Pearlman* v. *Harrow School*[3] was approved by the Privy Council —

"...the only circumstances in which this court can correct what is to my mind the error of the (county court) judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of 'structural alteration...or addition'."

Looking at the statement and the affidavit of the Executive Secretary of the Union referred to earlier two things would seem to be clear and beyond any doubt —

(1) The complaint of the applicant was lodged with the Industrial Court pursuant to section 56 of the Industrial Relations Act, 1967 and it has never been disputed that the Industrial Court had jurisdiction to entertain this complaint under that provision;

(2) That the error of law on the face of the record which was the subject of the complaint was that —

(a) the Industrial Court was alleged to be wrong in law in the interpretation of Article 26 of the Collective Agreement; and

(b) the Industrial Court was alleged to be wrong in law in the interpretation of section 24(2) of the Employment Ordinance, 1955.

At page 6 the judgment of the Privy Council in the *South East Asia Fire Bricks Sdn. Bhd.* case referred to the power of the Minister to remit to the Industrial Court. Then the judgment continues —

"The Industrial Court applied its mind to the proper question for the purpose of making their award. The award was accordingly within the jurisdiction of that court, and neither party has contended to the contrary. For the present purpose their Lordships will assume, without deciding, that the award contained one or more errors of law upon its face. If so, the error or errors did not affect the jurisdiction of the Industrial Court and their Lordships are therefore of opinion that section 29(3)(a) effectively ousted the jurisdiction of the High Court to quash the decision by *certiorari* proceedings."

Looking at the nature of the complaint lodged with the Industrial Court in the present case under section 56 of the Industrial Relations Act, 1967 and looking at the statement and affidavit of the Executive Secretary of the National Union of Hotel, Bar and Restaurant Workers, it is clear to my mind that without the necessity of going into the merits the application is caught by the ruling of the *South East Asia Fire Bricks* case. I accordingly order that the motion be struck out. Costs to the second respondent.

Motion struck out.

Solicitors: *Skrine & Co.; Shook Lin & Bok.*

PUBLIC PROSECUTOR v. KU LIP SEE

[A.Cr.J. (Yusof Abdul Rashid J.) October 20, 1980]
[Johore Bahru — Criminal Appeal No. 34 of 1979]

Criminal Law and Procedure — Charge of rape — Prima facie case — Accused asked to enter in his defence — Denial of accused — Accused acquitted — Jurisdiction of appellate court to reverse order of acquittal — Penal Code, s. 379 — Criminal Procedure Code, s. 271.

In this case the respondent had been charged with rape. At the end of the prosecution case the learned President found that the prosecution had established a *prima facie* case and he called on the respondent to enter on his defence. The defence of the respondent was an outright denial and nothing more. The learned President acquitted the respondent as he stated he was left in a real state of doubt as to the case for the prosecution and the respondent's guilt. The Public Prosecutor appealed.

Held: in the circumstances the order of acquittal must be reversed. What the learned President termed to be a real state of doubt was in fact fanciful doubt.

Cases referred to:-

(1) *Public Prosecutor* v. *Wan Razali Kassim* [1970] 2 M.L.J. 79.
(2) *Sheo Swarup* v. *King-Emperor* A.I.R. 1934 P.C. 227.
(3) *Arumugam & Anor.* v. *R.* [1947] M.L.J. 45, 47.
(4) *Public Prosecutor* v. *Datuk Tan Cheng Swee & Anor.* [1980] 2 M.L.J. 276.
(5) *R.* v. *Low Toh Cheng* [1941] M.L.J. 1.
(6) *Tara Singh & Ors.* v. *Public Prosecutor* [1949] M.L.J. 88.
(7) *Public Prosecutor* v. *Saimin & Ors.* [1971] 2 M.L.J. 16.

CRIMINAL APPEAL.

Datuk Abu Talib bin Othman for the appellant.

Teh Poh Teik for the respondent.

Cur. Adv. Vult.

Yusof Abdul Rashid J.: The respondent was acquitted and discharged by the learned President, Sessions Court, Johor Bahru on a charge of rape under section 379 of the Penal Code. On appeal by the Public Prosecutor, the order of acquittal was set aside and an order of conviction was substituted therefor, whereupon the respondent was sentenced to four years' imprisonment.

The learned President at the close of the case for the prosecution made a positive finding of facts and ruled that prosecution had established a *prima facie* case against the respondent. At page 29 of the Record of Appeal, the learned President stated:

"On evidence adduced by the Prosecution I was satisfied that PW2 *had been raped.* PW2's testimony that she had been raped was *corroborated by medical evidence.* Dr. Low Soo Eng (PW4) who examined her testified that PW2's hymen was torn. In the absence of any evidence that PW2 had indulged in forceful masturbation or that she had a fall on her private part *I accepted PW4's evidence that the torn hymen was caused by sexual intercourse.*

I accepted P1 as PW2's birth certificate and that she was born on September 2, 1965 as stated in P1. This means that at the time of the offence PW2 was 12 years 10 months old. *Her consent or otherwise as to the act of sexual intercourse was therefore immaterial as she was under the age of 14.*

With regards to the second ingredient that the accused raped her *there was no corroboration of her evidence.* Nevertheless after closely scrutinizing her evidence *I accepted her evidence that it was the accused who had raped her. The accused was no stranger to her as she had seen him for some time in the village.*

At the close of the case for the prosecution I held that the prosecution had made out against the accused, a *prima facie* case, which, if unrebutted would warrant the accused's conviction. I called upon the accused to enter into (*sic*) his defence." [emphasis added]

On going through the notes of evidence recorded by the learned President, I was satisfied that there was more than ample evidence to substantiate the finding of facts as stated above and I had no hesitation in associating myself with such finding. Had I been the trial judge I would have come to the same conclusion at the end of the case for the prosecution.

When the defence had adduced evidence, however, the learned President acquitted the respondent on the ground that the learned President entertained a reasonable doubt. At page 30 of the Record of Appeal, the learned President stated:

"Having seen and observed the accused's demeanour while giving evidence and heard the evidence of the defence in the light of the case for the prosecution, *I was left in a real state of doubt as to the case for the prosecution and the accused's own guilt.* I was not fully convinced of his story that he did not commit the offence but nevertheless it raised a reasonable doubt in my mind as to his guilt.

After considering the whole of the evidence before me, the prosecution and the defence, *I was left in reasonable doubt that he was the person who raped PW2 if at all PW2 was raped* . . . ." [emphasis added]

It was then necessary for me to scrutinize in detail the evidence adduced by the defence to determine whether the learned President had any basis in entertaining reasonable doubt on the *prima facie* case established by the prosecution. With respect, I was not satisfied that there was any basis at all on which to find any reasonable doubt on the case for the prosecution. It was not enough to entertain reasonable doubt on the basis that "... PW2 did not name the accused when she was first asked by her mother PW1 as to whether she had any sexual relations. It was more than a week later and only after PW1 had threatened her that she named the accused as the person who had raped her ..."

The learned President at pages 29 and 30 of the Record of Appeal stated:

"The case for the defence briefly was that in April 1978 the accused was a construction worker. Some time in April 1978 the accused moved into his friend's house (DW2) in Pandan, as he and DW2 were building a house at Kangkar, Tebrau about 2 miles away. He knew PW2 and he had spoken to her before. PW2 was staying two doors away from the house he was staying in. *He treated her as his younger sister. He denied having sexual intercourse with PW2.* He had never been to the riverside with PW2. He had never been to PW2's house in the afternoon to speak to PW2. During the day he was working with DW2 at the construction site about 2 miles away. He had his lunch with DW2 at the construction site. The food was brought from DW2's house. He did not leave his work site at any time in the afternoon in the months of May and June. He worked everyday including Sundays.

DW2 confirmed that the accused was staying with him. He was working with the accused in building a house at Kangkar, Tebrau. He and the accused went to work everyday. He and the accused had lunch brought from home at the working site. The accused did not leave the working site during working hours from 8.00 a.m. to 5.00 or 6.00 p.m. In so far as DW2's evidence related to the accused's *alibi* I have ignored it as no notice was given to the Public Prosecutor as required by section 402A of the Criminal Procedure Code." [emphasis added]

Relying on such finding of facts the learned President acquitted the respondent as, according to the learned President "... I was left in a real state of doubt as to the case for the prosecution and the accused's own guilt...". In his submission the learned counsel for the respondent urged me not to interfere with the findings of the learned President. *Public Prosecutor* v. *Wan Razali Kassim*[1] was cited in support of the proposition that an appellate court would be slow in interfering with the finding of facts of the trial court. Now, there is no dispute at all that an appellate court may reverse an order of acquittal even if such acquittal is founded on the findings of facts by the trial court. The Privy Council case of *Sheo Swarup* v. *King-Emperor*,[2] is sufficient authority and the case of *Arumugam & Anor.* v. *R.*[3] clearly explains the principles in some detail.

The Privy Council in the case of *Sheo Swarup* v. *King-Emperor* stated —

"There is, in their opinion, no foundation for the view, apparently supported by the judgments of some courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower court has 'obstinately blundered'. or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice,' or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result.

Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he had been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice."

Worley J. in *Arumugam's* case in making reference to the abovementioned Privy Council decision stated —

"In the course of argument, counsel for the defence in referring to the function of the appellate court referred me to the case of *Rex* v. *Ramasamy* [1930] S.S.L.R. 104 where Sir William Murison cited the *Empress of India* v. *Dayadin*, I.L.R. 4 All 148 accepted as applicable to the Colony the following statements of law —

'Finding of fact in criminal cases, which are appealed from, should not be interfered with unless there has been such stupidity and perversity by the trial judge, or he has so obstinately blundered, or gone wrong, that a miscarriage of justice has occurred.'

I think with great respect to Sir William Murison that criterion can no longer be accepted in view of the decision of the Privy Council in the case of *Sheo Swarup* v. *King-Emperor*."

Further, in his judgment his Lordship said —

"There are other reported local cases on the function of the appellate court of the Colony in dealing with evidence of fact which I referred to myself in the case of *Ong Joo Chin* v. *Rex* [1946] M.L.J. 1. I think I need not go further into the matter except to say, as I said in that case, that the appropriate criterion is that the appellant on questions of fact has to satisfy the appellate court that the judgment was against the weight of the evidence and that I think must

be the test whether it is an appeal against the acquittal or against a conviction."

As such, though an appellate court has jurisdiction to reverse an order of acquittal based on the finding of facts by the trial judge, the appellate court shall not lose sight of certain principles and one of them is that the appellate court shall be slow in disturbing the finding of facts arrived at by a judge who had the advantage of seeing the witnesses. It is also clear that the appellate court shall scrutinize the whole evidence in its totality and shall be satisfied whether the order of acquittal was against the weight of the evidence as a whole.

The whole evidence as recorded by the learned President and his grounds of judgment were scrutinized in detail and in my view, on the evidence, the order of acquittal should be reversed. It was the findings of the learned President that: —

(a) PW2 was raped;

(b) PW2's evidence that she was raped was corroborated by medical evidence;

(c) Dr. Low Soo Eng's evidence was accepted and that the torn hymen was caused by sexual intercourse;

(d) PW2's consent or otherwise was immaterial as she was under the age of 14;

(e) despite the lack of corroborative evidence as to the identity of the accused being the person who had raped her, PW2's evidence that it was the accused who had raped her was believed and accepted;

(f) by inference, the learned President had warned himself of the danger of convicting on PW2's uncorroborated evidence, he was ready to convict the accused had the accused failed to rebut the case for the prosecution as to his guilt; and

(g) the accused was no stranger to PW2 as she had seen him for some time in the village.

Against the overwhelming evidence as found by the learned President, the defence in its endeavour to create a reasonable doubt in the mind of the learned President offered an outright denial and nothing more. It was surprising to find the learned President entertaining what to him was reasonable doubt based entirely on the demeanour and denial of the respondent. It was also difficult to accept that having made an emphatic finding that PW2 was raped, the learned President took a round-about turn when in his grounds of judgment he said "... if at all PW2 was raped..." There was nothing in the evidence of DW1 or DW2 to cause the learned President to doubt that PW2 was raped when his findings had been "... Dr. Low Soo Eng (PW4) who examined her testified that PW2's hymen was torn. In the absence of any evidence that PW2 had indulged in forceful masturbation or that she had a fall on her private part I accepted PW4's evidence that the torn hymen was caused by sexual intercourse..." I found nothing in the evidence of the defence to justify the learned President to infer the probability of the hymen being torn due to any forceful masturbation or caused otherwise than by sexual intercourse. Thus, the finding of the learned President "... if at all PW2 was raped..." was founded on mere conjecture unsupported by any evidence. What he termed to be "a real state of doubt" was in fact "fanciful doubt".

The Federal Court in the case of *Public Prosecutor* v. *Datuk Tan Cheng Swee & Anor.*,[4] expressed the view regarding the responsibility of a trial judge to be: —

"...that the trial court should reasonably, properly, and judicially consider the defence in the light of the prosecution case and come, on the totality of the evidence before it, to a correct decision, without fear or favour, in the proper exercise of its judicial function...."

and it was most unreasonable for the learned President, on the totality of the evidence before him, to doubt as to whether in fact PW2 was raped. To arrive at a finding as the learned President did at the end of the case for the defence "... I was left in reasonable doubt ... if at all PW2 was raped...", in the absence of any evidence to the contrary, was indeed perverse and in so doing, the learned President had not properly carried out his judicial responsibility.

As regards the learned President's findings "... I was left in reasonable doubt that he (respondent) was the person who raped PW2...", I reviewed the whole evidence of the defence, and it was unfortunate that I had to differ from the findings of the learned President. In his grounds of judgment, the learned President made an emphatic finding at the close of the case for the prosecution "... that it was the accused who had raped her..." but reversed his findings simply because of the denial and demeanour of the respondent. If at all, the defence had in fact fortified the findings of the learned President because there was no probability that PW2 had made a wrong identification as to the person who had raped her. The respondent himself said that he was living in the same village as PW2 and in fact living two doors away; that he had treated PW2 as his sister. This surely showed that the respondent was closely known by PW2 and that he was not at all a stranger to her. It was wrong for the learned President to entertain any doubt as to who had raped PW2 without any other evidence than the denial and by merely observing the demeanour of the respondent in giving evidence. It may well be that the learned President had fallen into an error as feared by Terrell, Ag. C.J. in *R.* v. *Low Toh Cheng*[5] wherein his Lordship said:

"...but a general reference by the magistrate in his grounds of judgment to the demeanour of witnesses, without condescending to any particulars, may give rise to the suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of evidence but to the probabilities and which could not be supported in a detailed examination of the evidence...."

Had the learned President wished to rely on the demeanour of the respondent, at least he should have complied with the provisions of section 271 of the Criminal Procedure Code which provides —

"A presiding Magistrate recording the evidence of a witness may, at the conclusion of such evidence at the foot of the notes thereof, record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination."

The learned President deemed it unnecessary to make such remarks in the notes of evidence and then relied

heavily on the demeanour of the respondent in acquitting him. In this respect, the *dictum* of Spenser-Wilkinson J. in the Court of Appeal case of *Tara Singh & Ors.* v. *Public Prosecutor*[6] should have been borne in mind by the learned President. At page 89 thereof, Spenser-Wilkinson J. said —

"... It had been laid down, however, that 'an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question' [See judgment of Lord Greene, M.R. in *Yuill* v. *Yuill* [1945] 1 All E.R. 183]. This was a civil case and the principle applies with even greater force to criminal cases, especially where, as usually happens in this country, the witness is a non-European giving evidence in his native tongue through interpretation."

According to the respondent and purportedly corroborated by DW2, he worked at the work-site from 8.00 a.m. to 5.00 or 6.00 p.m. every day including Sundays and the construction was completed within six months. If this was true then the respondent would not have any social life except at night. But the respondent said he greeted PW2 whenever he met her and treated her as his sister. When and where could the respondent have met PW2? Surely not at the work-site which was 2 miles away! It could not be probable that the respondent met PW2 quite often after 6.00 p.m. along the road or at any particular shop. Respondent denied that he ever went to PW2's house whilst according to PW1, the respondent had come to the house to play mahjong. Obviously the learned President had not tested the evidence of the respondent in the light of the evidence as a whole.

Again, in accepting certain parts of the evidence of DW2 ignoring the other, the learned President had not considered his evidence in the light of the evidence as a whole. In his grounds of judgment the learned President dealt with the evidence of DW2 who had said "The accused did not leave the working site during working hours from 8.00 a.m. to 5.00 or 6.00 p.m." Evidently the learned President had not only taken this fact into consideration, he was somewhat influenced by it. In so far as the memory of DW2 was concerned, nothing he said could be relied on. DW2 could not recollect whether he and the respondent took 1½ months or 6 months to complete the construction of the house. PW2 said that the respondent stayed in the village from April to the end of August 1978 and the respondent in evidence said that it took him and DW2 about 6 months to complete the house. Now, if DW2's memory had failed him regarding this fact, could he be relied on when he alleged that the respondent had never left the work-site during working hours from 8.00 a.m. to 5.00 or 6.00 p.m.? In this respect, the learned President had failed to test DW2's evidence against other evidence available to him before accepting the fact adduced by DW2. The learned President had "ignored..." the evidence of alibi in favour of the respondent as adduced by DW2 "... as no notice was given to the Public Prosecutor as required by section 402A of the Criminal Procedure Code..." In fact, the evidence pertaining to alibi was inadmissible for non-compliance with the requirements of the said section 402A. The respondent could not be heard to say or cause evidence to be adduced to the effect that on those two occasions when PW2 said that the respondent was with her at the riverside, that the respondent was somewhere else instead. The learned President, had he tested the evidence of DW2 after the entire comparison and consideration of all the evidence should have equally ignored that evidence of DW2 that "The accused did not leave the working site during working hours from 8.00 a.m. to 5.00 or 6.00 p.m." Thus, it was not true that the learned President had considered the case for the defence in the light of the evidence for the prosecution and having taken the whole evidence in its totality.

Influenced by this piece of evidence which should in the first instance be rejected, the learned President might have entertained the doubts in favour of the respondent. In fact, DW2's evidence did nothing more than to fortify the case for the prosecution that it was most improbable that PW2 might have made any mistake as to the identity of the respondent being the person who had raped her. DW2 said nothing to substantiate the contention of the respondent that at the material date, time and place, the respondent had not gone to PW2's house and persuaded her to go to the riverside at night and that at the riverside on two occasions, it was the respondent who raped her. DW2's evidence lent no support even in casting any doubt on the case for the prosecution.

Before me, the learned counsel for the respondent submitted that the evidence relating to alibi was not intended to establish alibi in favour of the respondent. The learned counsel for the respondent urged me to treat such evidence for the purpose of discrediting the veracity of the evidence of PW2. In other words, I was urged to say that the evidence of PW2 in the light of the evidence of the defence had been tainted. I found nothing to justify such contention. I had considered the evidence of the respondent and DW2 and found that it was not reasonable for the learned President to entertain any doubt on the case for the prosecution.

The learned President cited the case of *Public Prosecutor* v. *Saimin & Ors.*[7] Sharma J. said —

"It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

Sharma J. in the same case said further that "... A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence." With respect to the learned President what he termed to be "reasonable doubt" was not one arising from the evidence of the defence nor from want of evidence from the prosecution. As such, the learned President entertained mere "imaginary doubt" based on conjecture.

Order accordingly.

Solicitors: *Abdul Rahman Saad & Assoc.*